OFFICE OF THE HEARING EXAMINER KING COUNTY, WASHINGTON

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REPORT AND DECISION ON APPEAL OF THRESHOLD DETERMINATION

SUBJECT: Department of Development and Environmental Services File No. **B99L3034**

ROSEBERG AVENUE APARTMENTS

Threshold Determination Appeal

Location: 11920 Roseberg Avenue South; on Roseberg Avenue South,

between South 119th and South 120th Streets

Applicant: Casey Group Architects represented by:

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Appellants: Residents of Roseberg Avenue South

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SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:

Deny the appeal
Department's Final Recommendation:

Examiner's Decision:

Deny the appeal
Deny the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:
Hearing Closed:
August 16, 2000
August 24, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Parking
- Access
- Pedestrian safety
- Equestrian safety
- Cyclist safety

SUMMARY:

Denies SEPA threshold determination second appeal regarding argued overflow parking impacts.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

- 1. **Proposal**. Tom O'Connor (the "Applicant") represented by Malcom S. Harris, proposes to construct a 36 unit apartment complex in two buildings with two stories, together with associated parking and landscaping on that portion of Roseberg Avenue South located just north of South 120th Street between Des Moines Memorial Way Drive South in unincorporated King County. The proposal is described in further detail in the plans contained in the hearing record as Exhibit No. 4. See also Exhibit No. 7. The proposed development would obtain access to South 120th Street (and subsequently to either Des Moines Memorial Drive South or Military Road South) via Roseberg Avenue. Having been heard previously by Examiner O'Connor, this matter now comes before Examiner review a second time.
- 2. **First Appeal Review**. On April 14, 2000, King County Hearing Examiner James N. O'Connor granted an appeal filed by the *ad hoc* informal organization called Residents of Roseberg Avenue South (the "Appellants"), ordering that the proposal be "remanded to the Department of Development and Environmental Services for the purposes set in Conclusion No. 3, above." In turn, Conclusion No. 3 of that same report and decision stated the following:

The appeal by Residents of Roseberg Avenue South should be granted, and this proposal remanded to the Department of Development and Environmental Services for additional review of the impacts of parking which will result on Roseberg Avenue South from the proposed development, and the establishment of conditions to effectively mitigate that impact; or, in the alternative, for the preparation of an Environmental Impact Statement, limited in scope, to address the impacts of parking resulting from the proposed development on Roseberg Avenue South.

3. **Department's Remand Decision and Action**. On May 23, 2000 with the intention of complying with the Examiner's April 14, 2000 decision, the Department of Development and Environmental Services ("DDES" or "Department") issued a Revised Mitigation Determination of Non-significance (MDNS) for the Roseberg Avenue Apartments proposal. In that reissued MDNS the Department required the following:

Traffic (Intersection Standards-KCC 14.80).

Because of the lack of pedestrian facilities in the area, the developer shall provide a walkway from the south property line to South 120th Street. The King County Traffic Engineering Section shall approve the final design of the walkway during building permit review.

Parking (Development Standards-KCC 21A.18).

The proposal for a 36 unit apartment shall be required to provide 71 off-street parking stalls consistent with the Applicant's site plan dated May 1, 2000.

The earlier MDNS (issued November 19, 1999) for which Examiner O'Connor granted the appeal filed by residents of Roseberg Avenue South, contained the same mitigation requirement regarding traffic, but made no mention of parking.

4. **Appeal Filed**. On December 13, 1999 the Residents of Roseberg Avenue South timely filed its appeal. Exhibit No. 4. That appeal raises the following substantive issues: traffic hazards, including traffic congestion, pedestrian/equestrian/cyclist safety, street parking, sight distance and road conditions. This Examiner conducted a pre-hearing conference on July 17, 2000 and issued a pre-hearing order on July 19, 2000. Pursuant to that pre-hearing conference, certain issues raised by the appeal were excluded from this review due to the principal of *res judicata*. Further, KCC 20.44.120.A.1 states "only one appeal of each threshold determination shall be allowed on a proposal." For these reasons, the pre-hearing order excluded not only new issues but also *any* issues that extended beyond the scope of the April 14, 2000 Examiner O'Connor ruling quoted in Finding No. 2, above. That issue was summarized in the July 19, 2000 pre-hearing order as follows:

Does the mitigation contained in the Applicant's revised proposal and in the Department's MDNS satisfy the Examiner's April 14, 2000 decision and order? If not, is an EIS required?

All other issues contained in the appeal and accepted in the pre-hearing order were accepted as corollary to, or supportive of, that principal issue. These subordinate corollary issues are as follows:

- Are the mitigation measures adequate to prevent overflow parking onto Roseberg Avenue?
- Does the proposal meet the minimum standards suggested in the hearing Examiner's findings of April 14, 2000?

- Will providing two opposite parking spaces create a probable significant adverse impact by "encouraging parking on Roseberg Avenue South"?
- Does pedestrian/equestrian/cyclist safety remain a probable significant adverse impact because "current mitigations do not preclude parking on Roseberg Avenue"?
- Will the site be managed adequately to address to on-and-off-site parking problems?
- Do the mitigations adequately address guest, office and RV parking requirements?
- Has the County-wide vehicle ownership per dwelling unit data been ignored? Is it relevant?
- Should the parking impact be reduced by reducing the number of permitted units?

In its summation, the Appellant asks that an EIS be required to be prepared; that the project be downsized to 24 units with the same parking stalls currently shown (71); that parking should be strictly prohibited on Roseberg Avenue between 120th and 118th (via signage and enforcement) to ensure pedestrian and equestrian safety; that the egress from the development provide a clear sight distance "as required by law"; and, that the speed limit on Roseberg be reduced and clearly posted. The Appellant further requests that the EIS be assigned to an "objective third party outside the King County DDES." The standards by which these issues are reviewed are discussed in Conclusion No. 1, below.

5. Number of Parking Stalls; Ratio of Parking Stalls per Dwelling Unit. The Applicant's revised site plan provides 71 parking stalls whereas the original submittal, reviewed in the first SEPA threshold determination appeal, proposed only 59 parking stalls. Thus, the ratio of proposed stalls to proposed number of dwelling units has changed from 1.63 stalls/unit to 1.98 stalls/unit. The Applicant proposes two street-side stalls designed so as not to intrude within existing traveled roadway. However, the Department recommends against those. The King County Department of Transportation (KCDOT) Supervising Engineer on this review indicates that one of those two additional spaces would conflict with entering sight distance standards contained in the King County Road Standards (KCRS).

In Conclusion No. 3 of his decision Examiner O'Connor did not require two parking stalls per dwelling unit. However, Examiner O'Connor did enter a finding at page 3 that, "there is substantial evidence that the number of parking spaces needed to accommodate on-site the vehicles associated with this development would average two spaces per dwelling unit." He based this finding upon a survey of apartment developments in the vicinity of the site, provided by the Appellants, showing that parking spaces needed to accommodate resident parking needs exceed the minimum spaces required by King County Code. He further noted that DDES acknowledged that overflow parking from both apartment complexes and single-family residences commonly locate on nearby streets. He noted further that the hearing record contained no evidence to the contrary. Thus, he found that:

The number of parking spaces proposed on the development site will be insufficient to accommodate the vehicles owned by residents and other vehicles which will be parked or

stored at the site or in the vicinity of the site as a direct result of the proposed development. Unless alternative parking areas are provided, vehicles generated by the development will be parked on Roseberg Avenue South.

As noted above, the Applicant then produced a proposal providing 12 additional parking stalls, 20 percent more than contained in the original proposal. Because this plan falls short of the argued 2:1 ratio by two-one-hundredths (0.02), the Appellants argue that it fails to meet the requirements of the remand order.

The Appellant argues further that County-wide vehicle ownership rates suggest that the almost-2:1 stall per unit ratio will be insufficient. This argument is based upon a newspaper article published 20 months ago (Exhibit No. 6-4). That article indicates that there are 205,670 more registered vehicles (including cars, trucks, motorcycles, etc.) in 1998 than in 1988 in King County. That statistic makes no distinction as to whether these vehicles are registered by homeowners or by commerce, industry, government, organizations, school districts, and so on. Apparently, based upon this statistic, the article goes on to say that nearly 300,000 more vehicles than drivers are registered in King County. Thus, for instance, a postal delivery driver who rides the bus to work and who owns a motorcycle in addition to a family car may ride four vehicles in a single day while claiming registered ownership of two. Thus, the article goes on to say that "there are about 2.5 cars or trucks for every dwelling place in the County." The article makes no distinction regarding the pattern of vehicle ownership. Thus the reader is uninformed as to what proportion of the vehicle ownership (or what proportion of vehicle ownership increases) are due to citizen/homeowner acquisition versus the acquisitions of other entities (such as governmental organizations, delivery companies, busses and taxis, etc.). Further, the article makes no demographic distinction regarding vehicle ownership patterns. For instance, do the single-family residential homes with three and four car garages in the Redmond vicinity have greater vehicle ownership rates than one bedroom apartments in Burien? Presumably, yes; but the actual data is not contained in the hearing record.

The Appellant also suggests that the almost-2.0 stall/unit ratio does not provide for management, maintenance and visitor parking. Both the Appellant and the Applicant provided the hearing record with surveys of parking circumstances and conditions at numerous other multi-family facilities in the area. The data provided by both, however, summarizes total stalls per unit. Thus, neither the Appellants' nor the Applicants' data provides insight into the proportionality of management/visitor parking (although the Appellant indeed provides photographs of where such parking is sometimes provided). Nonetheless, the data provided by both parties appears to summarize total parking units per unit regardless of designated or allocated use or user. The Department argues that the parking code makes no distinctions among resident, visitor and management parking requirements; but rather, summarizes them all together in a single required ratio.

- 6. **"Opposing" Parking Spaces.** This element of the development plan has been deleted and need not be reviewed further here.
- 7. **Pedestrian/Equestrian/Cyclist Safety; Parking Regulation on Roseberg Avenue**. The Appellant presents evidence of common equestrian use of Roseberg Avenue due an "equestrian center" located on that street. DDES responds that, in an urban neighborhood, "a speculative

impact to equestrian activity that is outside the control of either the County or the Applicant is perceived to be well outside the scope of SEPA authority by which mitigation could be imposed upon the Applicant." However, the evidence of record shows the presence of equestrian use on Roseberg Avenue to be *not speculative at all*. Rather, the hearing record shows that equestrian use of the street is common and ordinary.

To protect the safety interests of pedestrians, (and, for that matter, cyclists) curb, gutter and sidewalk frontage improvement will be required along the frontage of the subject property pursuant to code. Further, pursuant to SEPA authority, an off-site walkway from the subject property to South 120th Street will be required to be provided by this Applicant.

Appellants argue that sidewalks will not suffice for horses; that "softer" surfaces should be provided. The Department responds that the area is committed Urban in the Comprehensive Plan; that the equestrian center is a (legal) non-conforming use; and that, impacts need not be mitigated to support/protect a use that conflicts with the Comprehensive Plan and zoning. County trail plans do not designate Roseberg Avenue for either equestrian or other recreational use. Evidence suggests that some homeowners along Roseberg Avenue have encroached upon public right-of-way with their landscaping thereby limiting equestrian travel opportunity adjacent to the paved roadway. (The location of large shrubbery on neighboring properties is also argued to adversely affect street side parking availability and free movement of various users of the roadway.) The Applicant argues that he should not be required to mitigate conditions created by others.

- 8. **Development Density**. As an alternative to requiring additional parking, the Appellants suggests reducing the number of dwelling units on the property. In order to satisfy State Growth Management Act (GMA) requirements, the King County Residential Zoning Codes establish not only maximum densities but also minimum densities, in this case, considering the area of the zoning classification. In this case, considering the size of the subject property and the R-48 zoning classification that applies, the developer is required by law to provide at least 36 dwelling units—precisely the number proposed. The Department therefore argues that to require the Applicant to reduce the number of units below the minimum required "without adequate review" would be the same as telling the Applicant he does not have to comply with the state law. Says the Department in its preliminary report (Exhibit No. 1), "advising the Applicant to deliberately ignore the code governing the County's implementation of GMA would be in direct conflict with one of the major functions of the Department."
- 9. **Department Summation Excluded**. DDES failed to timely file its post-hearing summary with either the Appellant or with the Examiner. Consequently, the Department's summary has been excluded from this review.
- 10. **Conclusions Adopted as Findings**. Any portion of the following conclusions which may be construed as a finding is hereby adopted as such.

- 1. RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to "substantial weight". Having reviewed this "substantial weight" rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency "negative threshold determination" is whether the action is "clearly erroneous". Consequently, the administrative decision should be modified or reversed if it is:
 - ... clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order.

Reviewing the entire record in light of this standard, the following authorities will also be applied:

- A. WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Environmental Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.
- B. WAC 197-11-335 establishes that information used by the Department will be adequate when it is reasonably sufficient to evaluate the environmental impact of the proposal:
- C. WAC 197-11-330 lists factors that may be considered as part of a decision on the significance of a proposal's impacts. Generally, a DS is made only when, based on the information before it, the agency concludes that there are probable significant adverse impacts associated with a proposal <u>and</u> these impacts will not be mitigated by existing regulations <u>and</u> there are no additional conditions known to the agency, at the time of determination, that would mitigate those impacts.
- D. When the agency's decision imposes conditions (MDNS), a further level of inquiry may be made into the adequacy of those conditions. To be adequate, the conditions must mitigate significant adverse impacts of the proposal that have been specifically identified, must be based on policies identified by KCC 20.44.080 as sources of substantive SEPA authority, and must be reasonable and capable of being accomplished. However, KCC 20.44.080.C states in part that the various development standards cited therein "will normally constitute adequate mitigation of the impacts of the new development," but that:

within the urban growth boundary unusual circumstances related to a site or to a proposal, as well as environmental impacts not mitigated by the foregoing regulations, will be subject to site-specific or project-specific SEPA mitigation.

- E. KCC 20.24.080 authorizes the Examiner to impose additional conditions, modifications, or restrictions as appear necessary to make the application or appeal compatible with the environment or in conformance with existing laws, plans, policies, etc. Under WAC 197-11-660, the policies used as substantive SEPA authority for an MDNS must have been in effect at the time the threshold determination was issued.
- 2. Regarding the relationship between project density and related parking requirements, the Appellants appear to seek three not necessarily mutually exclusive alternatives: a) add more parking stalls; b) reduce the number of units; and/or, c) require on site live-in management.
 - A. At the R-48 zoning requires that at least 32 units be constructed. The Applicant has chose a design which would allow 36 units, certainly at the low end of the authorized density range of this zoning classification. The Applicant has testified that it would not be economically feasible to build any fewer than the proposed 36 units. RCW 43.21C.060 prohibits agencies from requiring the Applicant to do that which the Applicant cannot do.
 - B. The space available on this site allows for possibly two additional street side parking spaces within the 10-foot wide frontage strip to be dedicated to King County. As noted above, KCDOT opposes that option. KCDOT's representative testifies that one of those proposed additional spaces would contradict KCRS entering sight distance standards. The other, while assuring a parking stall per dwelling unit ratio of slightly over 2:1, probably would be inconsequential with respect to either benefit or impact effecting either the neighborhood or the subject property.
 - C. This review contains no citation of authority upon which the County could order an apartment owner to have an on site manager. The decision to employ an on site or off site manager is a financial and business decision which should be left to the owner of the development. The hearing record suggests that the Applicant is willing to consider such an option although a "full time on site manager" probably is not economically feasible.
- To accept a 1.98:1 parking stall per dwelling unit ratio in lieu of a 2:1 ratio is not "clearly 3. erroneous" considering the entire review record. Although Examiner O'Connor's findings certainly suggest that a 2:1 ratio probably would adequately mitigate probable significant adverse impacts, his decision/order does not specifically require that solution. Rather, he ordered the matter to be remanded to the Department "for additional review for the impacts of parking which will result on Roseberg Avenue South from the proposed development and the establishment of conditions to effectively mitigate that impact." He thereby remanded the matter to the Department to lawfully exercise its discretion rather than to substitute his own. Thus, we ask, was the Department's exercise of its discretion "clearly erroneous"? No. To find a decision clearly erroneous we must be left with a definite and firm impression that a mistake has been made. See case law citation, Conclusion No. 6. This hearing record does not leave a firm impression of that sort. On the contrary, it shows that across the community, there is a broad range of parking ratios among various developments achieving a broad range of results, sometimes with onsite management, sometimes without. The record shows general compliance with Examiner O'Connor's decision and remand order. Further, it shows that horses are already being ridden in the middle of Roseberg Avenue (in the absence of the proposed development).

- 4. There are some aspects of the Department's review that are troublesome: The Department's steadfast clinging to code (regarding, for instance, density) even when unusual circumstances have been found to exist; the Department's disregard for the presence of the equestrian center and community (environmental) context created by the equestrian center. See the WAC 197-11-794(2) emphasis on context when making threshold determination. Nonetheless, in the final analysis, whatever the route traveled to the Department's final (revised) MDNS decision, it is defensible under the clearly erroneous standard.
 - A. Regarding the needs of horses, KCDOT may consider allowing a crushed rock or other prepared unpaved surface for the required walkway to 120^{th. There is insufficient technical information} in this record to require an unpaved walkway, however. That is a matter better left to the reviewing engineers in KCDOT.
 - B. The density standards need not be adjusted to assume compliance with Examiner O'Connor's remand. A stall per dwelling unit ratio of 1.98 vs. 2.00 is a sort of angels-on-pinheads debate that is unnecessary to enter considering the general language of Examiner O'Connor's remand order and considering the evidence showing such a broad range of results from such a broad range of ratios in other developments in the area.
- 5. As noted in Conclusion No. 1, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the Appellant has not successfully borne that burden in this case. Considering the above findings of fact and the entire hearing record, it must be concluded that the Department's threshold determination and its compliance with Examiner O'Connor's remand order in this matter are not clearly erroneous and therefore cannot be reversed.
 - A There is no indication in the record that the Division erred in its procedures as it came to its threshold declaration of nonsignificance. Rather, the Appellant differs with the Department's assessment of impacts or the probability of potentially adverse impacts.
 - B. Although the Appellant argues that the information on which the Department based its determination was insufficient, there is no adequate demonstration that the information on which the Division based its determination is actually erroneous.
- 6. The evidence of record certainly confirms the correctness of Examiner O'Connor's decision to remand. That decision applied the clearly erroneous standard to the SEPA threshold determination argument to access whether a significant unmitigated adverse impact probably would occur. This decision, however, is limited to whether the Department has complied with Examiner O'Connor's order. KCC 20.44.120.A.1, as well as the legal principle of *res judicata*, preclude any deeper or more extensive review than that. Considering the entire review record, the Department's effort to comply with the remand order is sufficiently insouciant to inspire honest debate (Conclusion No. 4, above), but it is not clearly erroneous. A decision is "clearly erroneous" when the reviewer "is left with a definite and firm conviction that a mistake has been made." Leavitt v. Jefferson

County 74 Wn. App. 688, 875 P.2d 681(1994); Norway Hill Preservation and Protection Association v. King County Council, 87 Wn. 2d 267, 275, 552 P.2d 674 (1976). For the reasons indicated in the conclusion above, no such definite and firm conviction may be drawn from this review record.

DECISION:

The appeal is DENIED. The Apartments' second Mitigated Determination of Non-Significance of May 23, 2000 is AFFIRMED.

ORDERED this 5th day of September, 2000.

Seattle WA 98136-1673 Mavis & Jeffrey Christiansen R. S. Titus, Deputy King County Hearing Examiner

Penny S. Cook

TRANSMITTED this 5th day of Sentember 2000, to the following

FRANSMITTED this 5 th day of September, 2000, to the following parties and interested persons:		
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Kristen Langley **KC** Transportation Department Traffic and Planning Section MS KSC-TR-0222

Angelica Velasquez DDES/LUSD **Current Planning** OAK-DE-0100

MINUTES OF THE AUGUST 16, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOP-MENT AND ENVIRONMENTAL SERVICES FILE NO. B99L3034 – ROSEBERG AVENUE SOUTH (REMAND):

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing DDES was Angelica Velasquez. Participating in the hearing and representing KCDOT was Kristen Langley. Participating in the hearing and representing the Applicant was Malcom Harris. Participating in this hearing and representing the Appellant was Betsy Hamel. Other participants in this hearing as witnesses representing the Appellant were Dail Adams, Paul Takashima and Lori Corkum. Other participants in this hearing as witnesses for the Applicant were Jerry Litwin, James Jaeger and Tom O'Connor.

The following exhibits were offered and entered into the record:

DDES Preliminary Report to the Hearing Examiner, dated August 16, 2000 Exhibit No. 1

Reissued Mitigated Determination of Nonsignificance (MDNS) for the Roseberg Avenue Exhibit No. 2

Apartments (B99L3034) issued on May 23, 2000

Exhibit No. 3 Appeal of reissued MDNS by Diana Seely for Residents of Roseberg Avenue South

Revised project site plan received by the Department on May 1, 1999 Exhibit No. 4

Exhibit No. 5 Map showing zoning of surrounding vicinity Exhibit No. 6-1 Statement of Appeal, dated June 16, 2000; Notice of Appeal and Request for Consolidation, dated June 16, 2000; Requests for Prior Hearing Examiner and Appeals Consolidation, dated June 15, 2000; Handwritten note from Paul Takashima, citing King County Code Chapter 21A.38.020A, dated August 3, 2000; Letter from DDES, dated August 14,2 000

Exhibit No. 6-2 Seven photographs depicting apartments on 20th Avenue South

Exhibit No. 6-3 *NOT OFFERED*

Exhibit No. 6-4 Seattle Times newspaper article on traffic conditions, dated January 1, 1999; eight surveys of area Ratio of Apartment Units to Parking Spaces; seven pages of photographs relating to the surveys; Crime Free Multi-Housing Seminar brochure.

Exhibit No. 6-5 NOT OFFERED

Exhibit No. 6-6 Article of interview conducted by Dail Adams titled, "Good Apartment Managers balance parking and community", undated.

Exhibit No. 6-7 Three pages of photographs depicting categories of vehicles (by purpose and type)

Exhibit No. 6-8 Two pages of photographs depicting filled up guest parking at area apartments

Exhibit No. 6-9 Two pages of photographs depicting larger vehicle parking (rv's, semis, etc.)

Exhibit No. 6-10 Two pages of photographs depicting seasonal parking needs

Exhibit No. 6-11 Four pages of photographs depicting habits of area parking

Exhibit No. 6-12 One page of photographs depicting parking habits (showing horses, too)

Exhibit No. 6-13 Picture story about Roseberg Avenue South, six pages

Exhibit No. 6-14 Ten pages of photographs depicting egress site visibility of Roseberg Apartments with coordinating map

Exhibit No. 6-15 NOT OFFERED

Exhibit No. 6-16 Tom Barns photos (one page)

Exhibit No. 6-17 Excerpt from 1905-1940 Washington State Archives Map

Exhibit No. 6-18 Map showing bridle trail and horse storage; six pages of photographs depicting history of usage (inc. aerial photo); 13 pages of Pierce County and Washington State Code citations; 1993 King County Nonmotorized Transportation Plan;

Exhibit No. 6-19 Light Pole Study and photos; Storage unit parking policies

Exhibit No. 6-20 Copy of memo from Jerry Litwin of Casey Group Architects to Angelica Velasquez of DDES, dated May 1, 2000; portion of page G101, reduced, dated May 1, 2000; phone conversation notes by Lori Corkum

Exhibit No. 6-21 CPTED information

Exhibit No. 7 Three oversized pages of architectural drawings

Exhibit No. 8 Notebook of parking ratio studies